IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE R.BASANT

THURSDAY, THE 11TH OCTOBER 2007 / 19TH ASWINA 1929

Crl.MC.No. 2548 of 2007()

CC.111/2005 of CHIEF JUDICIAL MAGISTRATE COURT, THRISSUR
CC.103/2005 of JUDL. MAGISTRATE OF FIRST CLASS COURT, IRINJALAKUDA

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PETITIONER: 1ST ACCUSED:

CHANDRAN, AGED 37 YEARS,
S/O. MADASWAMY, DOOR NO.II/415, THIDEER NAGAR,
MADURAI, TAMIL NADU.

BY ADV. SRI.E.C.POULOSE
SMT.BOBBY RAPHEAL.C

RESPONDENTS:
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1. STATE OF KERALA,
REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

2. SUPERINTENDENT OF JAIL,
CENTRAL PRISON, VIYYOOR.

BY PUBLIC PROSECUTORSRI. GIKKU JACOB

THIS CRIMINAL MISC. CASE HAVING COME UP FOR ADMISSION ON 11/10/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

R. BASANT, J.

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Crl.M.C.No. 2548 of 2007

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Dated this the 11th day of October, 2007

O R D E R

Is the petitioner entitled to set off for the period from 17.12.2004 to 21.6.2005, during which period he was admittedly in custody, under Section 428 Cr.P.C.? Can the said period be reckoned as "period of detention" undergone by him during investigation, enquiry or trial of the same case i.e. C.C.No. 111 of 2005 before the Chief Judicial Magistrate, Trichur? These are the crucial questions surviving for consideration in this Crl.M.C. now.

2. Though various other reliefs were also claimed by the petitioner in this Crl.M.C., now the learned counsel for the petitioner presses only for set off for the said period in this case, i.e. C.C. No.111 of 2005.

3. A brief reference to skeletal facts appear to be necessary. On the night of 11/12.9.2004 a theft took place in the house of an advocate. A gold bangle was allegedly thieved. Crime No.733 of 2004 of Town East Police Station, Trichur was registered. Investigation was conducted in that case. A refer report was filed

on ..... by the Investigating Officer to report that the offence could not be detected.

4. While so, on 17.12.2004 the Irinjalakuda police arrested the petitioner along with another under suspicious circumstances. Crime No.743 of 2004 was promptly registered before the Irinjalakuda police. The accused in custody was interrogated. Interrogation of the accused allegedly furnished information to the police about the crime committed in Crime No.733 of 2004. On the basis of the confession statement of the petitioner herein under Section 27 of the Evidence Act, the gold ingot (obtained on melting the thieved gold ornament) was recovered from the jeweller on 17.12.2004. Seizure mahazar, which is marked as ..... in the trial clearly shows that the recovery was effected in Crime No. 733 of 2004 of Town East police station.

5. To cut a long story short and avoiding irrelevant details, an application was filed to reopen the investigation in Crime No.733 of 2004. The same was allowed. Investigation continued and final report dt..... was filed in Crime No. 733 of 2004 of Town East police station before the learned Chief Judicial Magistrate. The learned Chief Judicial Magistrate took cognizance and issued

production warrant to produce the accused. He was accordingly produced before the Chief Judicial Magistrate on 21.6.2005. The trial dragged on. The judgment in the case was pronounced on 11.10.2006. The accused was found guilty, convicted and sentenced. The verdict of guilty, conviction and sentence have now become final.

6. According to the petitioner, from 17.12.04, on which date he was arrested and on which date the stolen property in Crime No.733 of 2004 was recovered on the basis of the confession statement of the petitioner, to 21.6.2005 the petitioner was actually detained in connection with the investigation in crime No.733 of 2004 notwithstanding the fact that he was detained in connection with the investigation in some other crimes also. It is the contention of the petitioner that in the light of the decision of the Supreme Court in **State of Maharashtra** v. **Najakat** (AIR 2001 SC 2255) the petitioner is entitled for set off for the period 17.12.2004 to 21/6/2005. But unfortunately the petitioner has been given set off for the period from 21.6.05 to 11.10.2006. Thus, to put it in a nut shell, the period of detention is from 17.12.2004 to 21.6.2005.

7. Reports of the Magistrate and the prison authorities were called for. There is not a semblance of doubt or dispute that the petitioner has remained in custody from 17.12.04 to 21.6.2005. There is also no doubt or dispute that during this period investigation into Crime No.733 of 2004 was actually pending also. But the petitioner has not been given the benefits under Section 428 Cr.P.C. on the ground that his detention was not specifically authorised in Crime No.733 of 2004 (C.C.111 of 2005) during this period. The petitioner was produced as an accused in Crime No.733 of 2004 (C.C.111 of 2005) only on 21.6.2005 and therefore the period on an after 21.6.2005 alone can be reckoned for set off.

8. The learned counsel for the petitioner contends that this stand taken by the learned Magistrate and the prison authorities is in direct conflict with the dictum in **Najakat**. The counsel particularly relies on paragraph 18 of the said decision, which I extract below:

> "18. Reading Section 428 of the Code in the above perspective, the words "of the same case" are not to be understood as suggesting that the set off is allowable only if the earlier jail life was undergone by him exclusively for the case in which the sentence is imposed. The period during which the accused was in prison subsequent to the inception of a particular case, should be credited

> towards the period of imprisonment awarded as sentence in that particular case. It is immaterial that the prisoner was undergoing sentence of imprisonment in another case also during the said period. The words "of the same case" were used to refer to the pre-sentence period of detention under gone by him. Nothing more can be made out of the collocation of those words."

9. It will be apposite straight away to extract Section 428 Cr.P.C. also for a proper understanding of the dispute. It reads as follows:

> **"S. 428. Period of detention undergone by the accused to be set off against the sentence of imprisonment. -** Where an accused person has, on conviction, been sentenced to imprison-ment for a term (not being imprisonment in default of payment of fine) the period of detention, if any, undergone by him during the investigation, inquiry or trial of the same case and before the date of such conviction, shall be set off against the term of imprisonment imposed on him on such conviction, and the liability of such person to undergo imprisonment on such conviction shall be restricted to the remainder, if any, of the term of imprisonment imposed on him."
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> (emphasis supplied)

10. I do first of all take note of the fact that the investigation in Crime No. 733 of 2004 did admittedly take place on 17.12.2004. The

accused was interrogated. His confession statement was recorded. Recovery of the stolen article (converted into gold ingot) was made under Section 27 of the Evidence Act on that date as per a mahazar prepared. But the arrest of the accused was not reported to the court in Crime No.733 of 2004. Can that omission by itself justify denial of the benefit of **Najakat** and Section 428 Cr.P.C. to the petitioner? This is the crucial question to be considered. I repeat that there can be no dispute that the petitioner was under detention during the period 17.12.2004 to 21.6.2005. There can be no doubt that the investigation into the crime had taken place on 17.12.2004 and thereafter. But there was no specific order authorising the detention of the petitioner in this particular crime by the court concerned, i.e. the Chief Judicial Magistrate Court.

11. Earlier a reference was made by this Court to a Division Bench and the Division Bench considered the situation in the decision in **Benson** v. **State of Kerala & ors**. (2007 (3) ILR Kerala 738). It appears to me that the learned Judges of the Division Bench had not considered this question specifically as the relevant observations appearing in paragraph 13 of the judgment reads as follows:

> "Facts of this case would clearly show that prosecution had filed application to ensure production of the accused in other three cases. Production warrants were issued only on 16.7.2005, 31.10.2005 and .2.2006 in respect of C.C.Nos. 158/04, 1039/04 and 390/04 and therefore the period of set off can be reckoned only from those dates. Non issuance of production warrant by the Magistrate in those three cases or the delay in arresting and producing the accused in courts are not matters which are germane for our consideration in this case. We need only say that the benefit of set off under Section 428 of the Code has been correctly granted in all those three cases taking note of the date of arrest. Reference is therefore answered as above and the writ petition would stand dismissed."

12. In the facts and circumstances of this case, this Court cannot take the view that the non-issuance of the production warrant by the Magistrate or non-production of the petitioner before the Magistrate on 17.12.04 and thereafter notwithstanding the fact that the recovery of the stolen article was effected on 17.12.2004 in this case is not germane for the consideration of this court in this case. The vital facts of the case dealt with by the Division Bench are not available. But I can certainly come to the conclusion that in this case it is vitally relevant as to why on 17.12.04 and thereafter till 21.6.2005 the petitioner was not produced before the Magistrate or production

warrant issued to procure his presence. The crucial distinction is that on 17.12.2005, the stolen property in this case (after conversion into ingot) was recovered under Section 27 of the Evidence Act on the basis of the alleged confession statement of the petitioner. Under Section 428 Cr.P.C. what is crucially relevant is whether the period of detention undergone by the accused was during investigation, enquiry or trial of the same case.

13. In the facts and circumstances of this case, it cannot reasonably be held that the petitioner was not in custody during the period 17.12.2004 to 21.6.2005, not in connection with the investigation of this case. The question obviously is not whether the accused was produced before the learned Magistrate or a production warrant was issued. The question is whether the period of detention is attributable to the investigation, enquiry and trial in this case or not. That question has certainly got to be answered in favour of the accused.

14. To summarise and to harmonise **Najakat** with the decision in Benson, it has to be held that while considering the claim of set off an accused person every court has to consider whether the period

of detention undergone by an accused during investigation, enquiry or trial of the same case can be taken into consideration. If such detention is referable and attributable to the investigation conducted in the case, notwithstanding the absence of production of the accused or omission to issue a production warrant, the accused must be held to be entitled for set off. This is so notwithstanding the fact that the accused may be detained in custody in connection with other cases also and the detention was not exclusively referable to the case in question.

15. On the basis of the above discussions, I take the view that the petitioner is entitled for set off during the period 17.12.2004 to 21.6.2005. He shall be given the benefit of such set off by the prison authorities. Necessary revised warrant of commitment shall be issued by the learned Chief Judicial Magistrate.

16. This Crl.M.C. is allowed to the above extent.

17. Hand over the order.

(R. BASANT)
Judge

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